

# Have you noticed that burnt smell?

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Maximilian Steinbeis Fr 24 Jan  
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I'll be 50 soon, and with that age comes a certain propensity to sentimentalize about one's school days. Oh, those German lessons! Günter Grass, Heinrich Böll, Martin Walser. Nobody reads those guys anymore, and rightly so, if you think about it. I wonder whether this also applies to Max Frisch, the Swiss, whose dramatic parable "Biedermann and the Arsonists" was almost as inescapable for a German *Abiturient* as Goethe's Faust.

For the younger ones: The play is about a hair tonic manufacturer who is persuaded to accept two arsonists in his house. The two plan to burn down the house and make no secret of it. But Biedermann, cowardly, dishonest and scared of confrontation, lets them do as they please and even gives them a helping hand as he wants to be their friend so badly. And in the end, well: everything burns down.

Don't be Gottlieb Biedermann! My generation has deeply internalized this. Armies of high-schoolteachers have seen to that with West German thoroughness.

And yet...

## Poland

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The Biedermann parable does not fit the situation in Poland because there no-one has any illusions about their house not being in flames. In Europe at large, however, the parable seems to fit all the better. In politics as well as in the general public, the general impression still seems to be: Oh dear, those Poles have all kinds of problems with their democracy and constitution. We have to tread lightly there, especially us Germans, we know how sensitive they can be. And then we also need these people for our own priorities, whether it's the Green Deal or the EU army or that the migration crisis doesn't repeat itself. We are deeply concerned, of course, it's horrible, horrible, and we absolutely must enter into an open dialogue! But nicely and well-mannered. Let's not panic, ok?

I may be a bit hard to understand because of all the crackling and crashing and siren wailing, but I'll try anyway: HELLO! THE ROOF IS ON FIRE!

If you still don't believe it, just think about what happened in Poland yesterday.

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Two things, in fact. Firstly, the PiS majority in parliament has passed the "Judicial Disciplinary Act" aka "muzzle law", which, in open rebellion against EU law and the European Court of Justice, threatens any Polish judge who questions the legal exercise of office by another with disciplinary action up to removal from office. The President will probably sign the law quickly now, and it will enter into force a week later. And then hopefully the Fire Brigade will quickly roll out the hose - EU Commission will quickly start another infringement procedure at the ECJ in Luxembourg and apply for an injunction including a 300,000 Euro fine for every day of non-implementation.

Almost simultaneously, the plenum of the Supreme Court, 59 judges in all, has handed down its decision on the independence of the judges appointed by the PiS-controlled National Judicial Council since March 2018. The decision does exactly what the "muzzle law" is trying to prevent: Judgments in which judges nominated by the PiS-affiliated National Judicial Council participate are, according to the Supreme Court decision, issued by a court that is not properly established by law and therefore can be challenged on that ground – as far as the Supreme Court itself is concerned, in general, as far as the lower instances are concerned, individually. In order not to plunge the whole country into legal chaos, this does not apply to the past, but only to the future. Exception: the infamous new disciplinary chamber at the Supreme Court. That is not even a court of law at all from the outset.

This plenary decision clarifies the dissent between the old and the new judges at the Supreme Court which had produced diverging rulings. It binds the chambers of the Supreme Court directly, those of the lower instances indirectly.

The PiS had previously tried to push a spoke into the Supreme Court's wheels, using the blindly submissive Constitutional Court as an instrument. The PiS Sejm Marshal had filed a constitutional motion against the Supreme Court with the, well, "argument" that the Supreme Court was encroaching on the legislative powers of parliament. In the case of such a motion about the lawful use of competences, the involved state bodies are *ex lege* obliged to temporarily stop using the disputed competence – which was exactly what the PiS was trying to achieve. In the view of the Supreme Court, however, this obligation under Polish procedural law is outranked by the obligation under EU law to clarify the independence of the judiciary. Fun fact: if it had applied here, it would have cut both ways. Also the Sejm would have had to suspend its work on disciplining judges. It obviously hadn't (see above) which may be taken as an indicator of how serious the constitutional motion had been in the first place.

The government, for its part, has meanwhile announced that it will ignore the Supreme Court's decision, calling it "legally ineffective" and meaningless. The judiciary and state institutions are thus falling apart into two halves, one might think, each part no longer recognising the other. A "Mexican Standoff" is what they call this in thriller movies, I believe. "Venezuelan Standoff" might be even more appropriate here. But that image is not entirely correct. It's not that both sides are keeping each other in check with threats of violence. The Supreme Court operates by means of law, the government against them.

Unlike Venezuela, Poland is still a member of the European Union. And since there is no way of getting rid of them other than voluntary withdrawal under Article 50 TEU, the EU will have no choice but to escalate this conflict further – no matter how inconvenient this may be in terms of foreign, energy and whatnot policy. There is no way of whitewashing this or of taking a perspective from which it appears in any way sufferable. That applies to the Commission, it applies to the Member States, it applies to the German Government and to Angela Merkel.

Provided, of course, that one does not want the EU to cease to be a community based on the rule of law. Anyone who thinks such a development would be conceivable or even desirable (like Orbán and Kaczyński) should by all means continue to sympathize and appease. That's just consequential.

What about the ECJ? Its ruling of November 2019 about the standards of judicial independence in Poland is the point of reference to all these events. But is the question of independence really the first question that should be asked to a court? Is it not necessary to check beforehand whether the court has been lawfully established at all? Such an "establishment test", argues PAWEŁ FILIPEK, is possibly better suited to solve the problem than the "independence test" used by the ECJ, because it is based on objective facts rather than on the individual existence or non-existence of the respective court's or judge's independence. But many cases are still open, and the ECJ case law may evolve.

One of the standard methods used by the PiS government (they probably learned this from Orbán as well) to immunise themselves against constitutional criticism is to point out that what they do is allegedly common practice elsewhere. This is also the case with the "muzzle law": It's all perfectly normal, according to the PiS government, in, for example, France. French jurists are, however, better placed to vouch for the correctness of that analogy than Polish politicians, and dozens of them, led by SÉBASTIEN PLATON, declare it utterly false.

The EU Parliament, unlike at times the Commission and definitely the Council, seems to be very much aware of the imminent danger the Union finds itself in as long as Poland and Hungary can believe they can get away with murder. By a large majority, the EP has passed a resolution calling on the Council and Commission to make full use of their possibilities vis-à-vis both. RÉNATA UITZ describes how PiS and Fidesz are playing cat and mouse with the Council and the Commission, and urges those to finally take a closer look at the context of the legal policy of these two countries --especially since the attacks against the independent judiciary have long since exceeded the tolerable level not only in Poland but also in Hungary.

*Thanks to Patryk Wachowiec for valuable input.*

## Guided democracies

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What a country looks like where the "will of the people" is embodied by the ruler who steers things past law and constitution, and reproduces itself in sham-democratic ways can be seen in **Russia**. There, the fog (smoke?) of confusion which President Vladimir Putin has caused with his announcement of a constitutional reform is gradually lifting.

No need to be deceived by Putin's proposals, argue MAXIM TIMOFEEV and OLGA KRYAZHKOVA: Their core is a reconfiguration of the central constitutional institutions and an attempt to strengthen personal, rather than institutional power, more precisely Vladimir Putin's, which is to be cemented beyond the end of his term of office in 2024. The fact that these reforms are not driven by political necessity is also visible in the way it will be implemented: without any public debate, without justification and in an overly tight schedule.

In the meantime, an amendment proposal has been introduced in the Russian Parliament. CAROLINE VON GALL examines its internal contradictions:

Although the importance of the primacy of the constitution is strongly emphasised in Putin's speech, the remarks show a disregard for its freedom-protecting contents and even appear "sarcastic" in parts. The proposed amendments raise fundamental legal questions with regard to the separation of powers without showing any signs of sensitivity for the problem. The supposed strengthening of the constitution, its supremacy and the constitutional court aims solely at the constitution as a factor of regime legitimacy and stability. The point is to steer the mystery surrounding Putin's retention of power in 2024 more strongly, to broaden the options and to officially test a new scenario with the Council of State, without thereby deciding all the questions.

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Bewerbung bis 15.02.2020 an Humboldt-Universität zu Berlin, Juristische Fakultät, Prof. Dann, Unter den Linden 6, 10099 Berlin oder bevorzugt per E-Mail an sekretariat.dann@rewi.hu-berlin.de.



**Hungary** can also be counted among the "guided democracies". One would just help legitimize Viktor Orbán's regime if one simply played along as loyal opposition, obediently losing elections for him. The small and creatively satirical "Party of the Two-Tailed Dog" does the opposite. On the occasion of the grotesque anti-refugee referendum 2016, they had produced an app with which voters could photograph their invalidated ballot and upload the picture onto the Internet as a protest message. The election commission had fined the party for this. In the absence of a sufficiently specific legal basis, this violated the freedom of expression, according to the Grand Chamber of the European Court of Human Rights this week. My comment on this is [here](#).

As far as **Turkey** is concerned, one might think that the government's steering power over the judiciary is not so comprehensive after all: The Turkish Constitutional Court has recently lifted the blocking of Wikipedia, which had been in place since 2017, as unconstitutional. [CEM TECIMER](#) explains why it would be misguided to be all too optimistic now, though: First, six judges nominated by Erdogan dissented, with extremely questionable arguments, and they will be in office for years to come. Secondly, the Court took two years to reach a decision, and would probably have dawdled even longer if it hadn't feared the disgrace of an ECHR judgment from Strasbourg denying it the quality of an effective legal remedy for human rights violations.

## (As yet) unguided democracies

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What is easily overlooked, while "Brexit gets done", is the fact that Boris Johnson is about to have his way with the UK Constitution in the most far-reaching manner – massively shifting the balance of power in the country in favour of the executive and at the

expense of the legislature and the judiciary.

The freshly enacted Withdrawal Agreement Bill contains a clause which in certain cases gives the government ministers the competence to tell the courts how to interpret the law. This applies to EU law which, unlike the jurisdiction of the ECJ, will continue to apply in the UK for the transitional period.

That's right: Ministers tell courts how to interpret the law.

Not in China, not in the Soviet Union. No, we are talking about the UK.

The House of Lords, with its venerable Constitution Committee, had initially tried to remove this clause from the bill but was ultimately powerless against the Tory majority in the House of Commons. The fact that Johnson and his government are not inclined to let some elitist constitutional pissants walk all over them now after they won the election, was immediately apparent when the Tories instructed the House of Lords that may have to leave comfy old Westminster and prepare to move up north soon, to York perhaps or Birmingham, to get back in touch with the "real people", for a couple of years at least while the House of Parliament is being renovated, or maybe forever.

That's the way guiding is done under Boris Johnson's rule. That's how it is now.

In **Spain**, on the other hand, that sort of thing appear to be out of question for the time being, whatever the most fervent Catalan nationalists may like to believe. Questions arise, however, about how the country, or more precisely its Supreme Court, deals with its obligations under European law. The debate about the would-be MEP and imprisoned separatist leader Oriol Junqueras and the consequences of the ECJ ruling on MEP immunity has continued this week: GERMÁN M. TERUEL LOZANO contradicts the critical reading that the Spanish Supreme Court had snubbed the ECJ and, on the contrary, interprets the ruling as an offer of dialogue within the European judicial network.

## Germany

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One of the most embarrassing stains on the German legislator's shield of honour is his inability to pass a constitutional electoral law. Time is of the essence since the next federal election is already on the horizon. Without reform the number of *Bundestag* members threatens to spiral out of control, due to the growing mismatch between the proportional share of seats particularly of the CDU/CSU and their number of directly elected candidates. Any compromise, so far, seems to be either detrimental to democracy (*Grabenwahlrecht*) or would foreseeably jeopardize the mandates of those who'll have to agree to it. Now, however, THOMAS GSCHWEND and MARCEL NEUNHOEFFER have presented a new proposal on how the problem could be solved in a "minimally invasive" manner. Nevertheless, something's gotta give.

In Germany, the federal states are in charge of police law and thus of the legal basis for the use of artificial intelligence for public security. This is made difficult by the fact that it is not yet clear what AI actually can and will be able to do in this respect. Vague general clauses that cover all possible technical developments from the outset? Not a good idea, warns SEBASTIAN GOLLA and recommends to make police law more self-learning itself.

Federal diversity and uniform protection of fundamental rights do not go well together, neither in the Federal Republic of Germany nor in the European Union. The Federal Constitutional Court does not want to suffer the fate of the *Länder* constitutional courts and be pushed into irrelevance by the increasingly rights-aware ECJ. In its epochal twin decision "*Right to be Forgotten I and II*" last November, the Federal Constitutional Court suggested a solution to this conflict which, in the opinion of KLAUS FERDINAND GÄRDITZ, "replaces a rigid system that stratifies and neatly separates the validity of fundamental rights according to layers of competence (...) with a fundamental rights mobile glittering with diversity."

Last but not least: DANA SCHMALZ has caused quite a stir with her call on legal professors to stop the ignoble practice of leaving doctoral theses piling up on their desks unmarked and unread for months and years. They do this in far too large numbers in Germany, to the effect that all scientific and career-promoting value exhausts from these works of labour like vitamins from frozen vegetables. Nowhere else is the shameful and anti-scientific state of dependency of most young, precariously employed academics in Germany so blatantly obvious as here. The astonishing and somehow deeply impressive thing about this is that so many unbelievably great and gifted young people still expose themselves to these awful conditions.

By the way: if you want to do like I did in the 90s and run away from academia into journalism – we might have something for you. We are thinking of starting a Verfassungsblog podcast and are looking for a student assistant with audio experience to help us here in Berlin with the production and distribution. Interested? Then please send a mail to [info@verfassungsblog.de](mailto:info@verfassungsblog.de).

One more thing: We also need an office now. At the moment we all still work from home, and that won't do anymore. Does anyone know of a room in Berlin for 4-5 work stations for subletting? That would be great.

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All the best,

Max Steinbeis





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All the best, *Max Steinbeis*

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